

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

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JOSEPH F. HUTCHINSON, et al.,

Plaintiffs,

vs.

FIFTH THIRD BANCORP,

Defendant.

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CASE NO.  
C-1-01-789

VOLUME II

Deposition of: PAUL L. REYNOLDS, ESQ.

Pursuant to: Notice

Date and Time: Monday, June 13, 2005  
10:00 a.m.

Place: Keating, Muething & Klekamp, PLL  
1400 Provident Tower  
One East Fourth Street  
Cincinnati, Ohio 45202

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Notary Public - State of Ohio

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## I N D E X

PAUL L. REYNOLDS, ESQ. PAGE  
FURTHER EXAMINATION BY MR. MEYER 65

EXHIBITS	MARKED	REFERENCED
PLAINTIFFS' EXHIBIT 32	73	73
PLAINTIFFS' EXHIBIT 33	112	112
PLAINTIFFS' EXHIBIT 24	116	116
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1 PAUL L. REYNOLDS, ESQ.

2 a witness herein, having been duly sworn, was further  
3 examined and deposed as follows:

4 FURTHER EXAMINATION

5 BY MR. MEYER:

6 Q. Paul, if you tell us you're going to continue  
7 to tell the truth, we won't have to swear you in.

8 A. I will.

9 Q. Let me ask you this. Exhibit 22, the  
10 timetable, a few final questions. You remember this,  
11 we were talking about Section 2-B, page 1 of Exhibit  
12 22, at the bottom, where it says, it is projected that  
13 annual additions resulting from the discharge of the  
14 ESOP loan on June 30, 1998 is estimated at \$286,287.  
15 Do you see that?

16 A. Yes.

17 Q. I'll ask you what you know. Do you know  
18 whether that amount of annual additions was actually  
19 applied to the discharge of the loan by June 30,  
20 1998?

21 A. Ask me that question again.

22 Q. Okay. Let me ask you a preliminary question  
23 to that.

24 A. Okay.

25 Q. In 1-A and B there were certain payments that

1 were made toward the principal and interest due on the  
2 loan.

3 A. Right.

4 Q. I think we established that that probably did  
5 not discharge the loan as of June 30, 1997; is that  
6 your understanding?

7 A. That was, I think, what we talked about last  
8 time, yes.

9 Q. And the loan was discharged sometime after  
10 June 30, 1997, is that right, although we don't know  
11 when?

12 A. Yeah, I don't know when it was actually  
13 discharged.

14 Q. Okay. And then if we get down to 2-B, it  
15 appears that it wasn't discharged by June 30, 1997  
16 because this document is still talking about projecting  
17 a certain amount of money to be used to discharge the  
18 loan by June 30th, 1998.

19 A. No, that's not what it says.

20 MR. FISCHER: Objection.

21 BY MR. MEYER:

22 Q. Okay. Does 2-B relate at all to the  
23 discharge of the loan as of June 30, 1998?

24 A. What 2-B says is that it assumes, as of June  
25 30, 1998, the loan will have been discharged and,

1 therefore, the money that would have been used to repay  
2 the loan would then be included as additions to the  
3 ESOP.

4 Q. Let me see if I understand that. So 2-B is  
5 assuming that sometime before June 30, 1998 the loan is  
6 going to be discharged and that there will be some  
7 additional monies in the plan as per dividends or  
8 whatever source?

9 A. The money that would have otherwise been used  
10 to repay the loan would be put back into the plan and  
11 those are treated as additions to the plan rather than  
12 used to pay down the loan because the loan has been  
13 discharged.

14 Q. So, once again, can you tell from this  
15 timetable, Exhibit 22, what amount was remaining unpaid  
16 on the loan after the payments were made in 1-A  
17 and B?

18 A. No.

19 Q. So the reference in 2-B of this timetable,  
20 the reference to annual additions, that would be  
21 amounts over and above whatever it took to pay off the  
22 loan?

23 MR. FISCHER: I'm going to object to the form  
24 of the question.

25 A. I don't know that I can answer that as a yes

1 or no question.

2 Q. I don't need a yes or no, I need you to  
3 explain. If that's wrong, then explain why it's wrong.  
4 I thought I was reiterating what you said earlier.  
5 Obviously, I wasn't.

6 A. No, I don't think you did. 2-B doesn't talk  
7 about what it will take to repay the loan because it  
8 assumes the loan has been repaid.

9 Q. Sometime between June 30, 1997 and June 30,  
10 1998?

11 A. Sometime prior to June 30, 1998. '97 really  
12 doesn't matter at that point because this is talking  
13 about the money that'll be in there for the plan year  
14 ending 1998, June 30, 1998, how much money will be in  
15 there to be treated as an addition to the plan.

16 Q. Meaning that it's money that's in there that  
17 cannot be used to discharge the loan because it's an  
18 assumption the loan has already been discharged?

19 A. Correct.

20 Q. Now, if the loan was discharged between June  
21 30, 1997 and June 30, 1998, where did the money come  
22 from to discharge that loan?

23 MR. FISCHER: Objection to form.

24 A. I don't know where -- I don't know what the  
25 source of the individual funds were that were used to

1 discharge the loan.

2 Q. Okay. Do you know that there were funds to  
3 use to discharge the loan between June 30, 1997 and  
4 June 30, 1998?

5 A. I don't know the accounting of the plan.

6 Q. Can you tell from this Exhibit 22 whether  
7 there was any balance, unpaid balance, of principal or  
8 interest after June 30, 1997?

9 A. I cannot. I can't tell from this document.

10 Q. Do you know from any source whether that loan  
11 was discharged as of June 30, 1997?

12 A. I don't know what date it was discharged.

13 Q. Do you know whether it was discharged as of  
14 June 30, 1997?

15 A. I don't.

16 Q. What is the implication for terminating the  
17 plan, of the statement in 2-B that there is projected  
18 to be annual additions of \$286,287; does that have any  
19 implications for terminating the plan?

20 A. I don't know. Directly, I don't know.

21 Q. Is there anything in this timetable that, in  
22 hindsight, you believe is incorrect or a faulty  
23 projection such that the plan could not be terminated  
24 consistent with Section 415 as of June 30, 1998?

25 MR. FISCHER: Just time-wise, faulty



1 projections as looking back or faulty projections  
2 as of the date he first saw this?

3 MR. MEYER: I really want to get at both of  
4 those. That's why I'm asking in general, any  
5 faulty projections either that were known at the  
6 time or were known only in hindsight.

7 MR. FISCHER: Objection to form.

8 A. At the time I don't recall there being any  
9 projections that anyone looked at in the timetable and  
10 saying that anything in here was faulty. After the  
11 fact, it was my understanding that the plan could not  
12 be terminated because of the Section 415 violations  
13 that would have been incurred in the event that it was  
14 discharged. However, the plan was terminating, excuse  
15 me.

16 Q. Is that because of any projections in this  
17 timetable?

18 A. It related to the amount of money in the plan  
19 and the salary of the participants in the plan. So to  
20 the extent those are used in here, yes, it would be  
21 related to that.

22 Q. Have you seen any documents that would tell  
23 you what the actual payroll was as of June 30, 1998?

24 A. Not that I recall.

25 Q. From reading 2-B, what was the projected

1 payroll, eligible payroll, as of June 30, 1998?

2 A. Says \$328,137.

3 Q. As we sit here today, you do not know how  
4 much the actual amount of payroll deviated from that  
5 number?

6 A. I do not.

7 Q. Where would we find such documents, do you  
8 know?

9 A. I would assume that Jim Gurton would have  
10 them. Someone in the benefits or the payroll group at  
11 Fifth-Third.

12 Q. The last time we were together you said that  
13 you had some documents that relate to the Suburban ESOP  
14 in your office; did I hear that correctly?

15 A. Yes.

16 Q. Have you reviewed those documents recently?

17 A. Prior to the last time, prior to last week,  
18 within the last week, yes.

19 Q. Can you tell us what those documents consist  
20 of?

21 A. Mostly, correspondence, drafts of the  
22 affiliation agreement, drafts of the information, the  
23 timetables and the discussions related to that.

24 MR. MEYER: Let's just go off the record for  
25 a minute.

1 (Off the record.)

2 BY MR. MEYER:

3 Q. In your withdrew of the records in your  
4 office, did you find any explanation of the discrepancy  
5 between the projected amount of payroll in Exhibit 22  
6 and what the actual payroll was?

7 A. No.

8 Q. Did you see any narrative explanation, for  
9 example, of how many employees were not on board and  
10 their payroll included as eligible payroll as of June  
11 30, 1998 as compared to this projection in the  
12 timetable?

13 A. No.

14 Q. I may have asked you this before, I don't  
15 recall if I did. We know that certain employees of  
16 Suburban were not hired by Fifth-Third but, instead,  
17 were given severance agreements. Do you know whether  
18 their severance pay would be included as eligible  
19 payroll as of June 30, 1998?

20 A. No.

21 Q. You know?

22 A. I don't know.

23 Q. Do you know whether their severance payments  
24 were included in this projection of payroll of \$328,137  
25 in Exhibit 22?

1 A. I don't know.

2 Q. Just so the record is clear, because I don't  
3 exactly know what you said, did you or someone on  
4 behalf of Fifth-Third actually review these projections  
5 to determine the accuracy of the projections at the  
6 time of the merger, back in 1997, does it appear on  
7 Exhibit 22?

8 A. I did not. I don't know if anyone else did  
9 or not.

10 (Plaintiff's Exhibit Number 32 was marked for  
11 identification.)

12 Q. Let's look at Exhibit 32. If you would  
13 assume with me that Exhibit 32 is taken from the  
14 affiliation agreement at Section 5(e)1 of the  
15 affiliation agreement, my first question to you is,  
16 have you recently reviewed the affiliation agreement?

17 A. Yes.

18 Q. And have you reviewed Section 5(e)1  
19 recently?

20 A. Yes.

21 Q. Let me ask you about the first part of  
22 Exhibit 32 wherein it states that Suburban Bancorp  
23 shall develop a written description and timetable. To  
24 your knowledge, is that the timetable that we've been  
25 reviewing here in your deposition?

1 A. Yes, to my knowledge.

2 Q. Exhibit 32 goes on to state that that written  
3 description and timetable shall be provided to and  
4 approved by Fifth-Third and its counsel. What would be  
5 the reference to counsel? Would that be you?

6 A. It would be me in consultation with Steve  
7 Goodson.

8 Q. Was that approved by Fifth-Third and its  
9 counsel, that timetable?

10 A. Yes.

11 Q. I take it you do not know exactly what review  
12 is made by Fifth-Third, the details of that review  
13 prior to the approval?

14 A. No.

15 Q. You do not know?

16 A. No.

17 Q. Says that the timetable shall set forth all  
18 actions necessary to make contributions to the Suburban  
19 Bancorp and Employee Stock Ownership Plan and/or to  
20 have the ESOP sell unallocated shares under the ESOP to  
21 fully repay the ESOP's existing loan.

22 And that's what we read in paragraph 1-A  
23 and B of the timetable?

24 MR. FISCHER: Objection.

25 Q. If you know.

1           A.    I don't remember particularly what the  
2           timetable says in those paragraphs.

3           Q.    It says, these contributions shall be in  
4           compliance with Section 415; do you see that?

5           A.    Yes.

6           Q.    Do you know if those contributions with  
7           reference to the timetable did comply with Section  
8           415?

9           A.    The contributions themselves?

10          Q.    Yes.

11          A.    I don't know.

12          Q.    Let me hand you back Exhibit 22 and ask you  
13          if the contributions referenced in 1-A and B -- if, to  
14          your knowledge, those contributions complied with  
15          Section 415 or if you have any reason to believe they  
16          did not?

17               MR. FISCHER:  Objection to form.

18          A.    I don't know.  I don't have any reason to  
19          believe whether they did or didn't.

20          Q.    Exhibit 32 goes on to say that Suburban  
21          Bancorp shall develop a written description and  
22          timetable to amend the ESOP to authorize the sale of  
23          unallocated shares to repay the loan.  To your  
24          knowledge, is that a reference to what was required by  
25          the timetable in paragraph 1-B?

1 A. 1-B is, I think, one of the steps necessary  
2 to complete the requirements of the second paragraph.

3 Q. Second paragraph of Exhibit 32?

4 A. Yes.

5 Q. And then Exhibit 32 goes on to state a third  
6 requirement here, Suburban shall develop a written  
7 description and timetable to terminate the ESOP. Do  
8 you see that?

9 A. Yes.

10 Q. Do you know what provisions of the timetable  
11 related to terminating the ESOP?

12 MR. FISCHER: Objection.

13 Q. If any?

14 A. I believe 2-C.

15 Q. Exhibit 32 then goes on to state that the  
16 written description and timetable -- or excuse me, that  
17 Suburban would submit the ESOP to the Internal Revenue  
18 Service for a determination letter. That the ESOP, as  
19 so amended and terminated, continues to be a qualified  
20 retirement plan and employee stock ownership plan under  
21 Sections 401(a) and 4975(e)(7) of the code. Do you see  
22 that?

23 A. Yes.

24 Q. Do you know if that was done by Suburban?

25 A. I don't think so.

1 Q. Do you know why it was not done?

2 A. If I recall, it was because that there was a  
3 known Section 415 violation at the time and, therefore,  
4 there wasn't an expectation that it would be  
5 submitted.

6 Q. What was that known Section 415 violation?

7 A. That the amount of funds in the plan, if --  
8 as compared to the participants in the plan, if you  
9 would terminate it, it would have resulted in a 415  
10 violation.

11 Q. If it had been terminated as of June 30,  
12 1998?

13 A. Yes, I believe that was the date.

14 Q. Exhibit 32 goes on to state that distribution  
15 of the shares and any other assets of the ESOP shall  
16 not occur until after the receipt of the foregoing IRS  
17 determination letter. Was that provision complied  
18 with?

19 A. I don't think the determination letter was  
20 received, but I'm not sure.

21 Q. Do you know if eventually there was a  
22 determination letter received from the IRS?

23 A. I don't know.

24 Q. Exhibit 32 goes on to state that, in  
25 connection with the development of the written



1 description and timetable referred to above and  
2 resolution of the ESOP -- you see that?

3 A. Yes.

4 Q. -- the parties agree they intend that, to the  
5 extent not prohibited by applicable law, the ESOP shall  
6 be maintained through the date of its final termination  
7 for the exclusive benefit of individuals who had become  
8 ESOP participants on or before the effective time. Do  
9 you see that?

10 A. Yes.

11 Q. Do you know what's meant by the effective  
12 time?

13 A. That is the -- I think it was defined in the  
14 document as the closing date of the acquisition.

15 Q. Was this Suburban ESOP maintained through the  
16 date of its final termination for the exclusive benefit  
17 of individuals who had become ESOP participants on or  
18 before the effective time?

19 MR. FISCHER: Objection. Misleading. That's  
20 not the sentence.

21 A. Can you say that -- can you ask me that  
22 again, please?

23 Q. Yes. I'm asking you whether this Suburban  
24 ESOP was maintained through the date of its final  
25 termination for the exclusive benefit of individuals

1 who had become ESOP participants on or before the  
2 effective time?

3 MR. FISCHER: Objection.

4 A. No.

5 Q. Now, was it the intent of Fifth-Third, at the  
6 time of the affiliation agreement, that this Suburban  
7 ESOP be maintained for the exclusive benefit of  
8 individuals who had become ESOP participants on or  
9 before the effective time?

10 MR. FISCHER: Same objection.

11 A. Yes.

12 Q. Did Fifth-Third's intent in that regard  
13 change at some point?

14 A. I'm not sure I understand that question.

15 Q. Did Fifth-Third's intent change from what is  
16 stated in Exhibit 32, that the ESOP be maintained  
17 through the date of final termination for the exclusive  
18 benefit of individuals who had become ESOP participants  
19 on or before the effective time? Did that intent of  
20 Fifth-Third change at some time?

21 MR. FISCHER: Same objection.

22 A. Yes.

23 Q. When did that intent change?

24 A. When the -- when it was determined that the  
25 plan couldn't be terminated and that Suburban had not

1 taken the steps necessary to get approval from the  
2 Internal Revenue Service to terminate the plan.

3 Q. Now, what step, by this agreement, was  
4 Suburban to take that they didn't do?

5 A. I don't have page numbers for your  
6 Exhibit 32.

7 Q. Let's just agree to write them on there.  
8 We'll make it pages 1, 2, 3 and 4. And I'll write  
9 those on the exhibit.

10 MR. MEYER: Go off the record for a minute.

11 MR. FISCHER: Sure.

12 (Off the record.)

13 MR. FISCHER: Back on. Go ahead.

14 BY MR. MEYER:

15 Q. You were explaining certain pages of Exhibit  
16 32, you wanted to make a comment?

17 A. Yes. If you look at page 2 through page 3,  
18 beginning with the small letter D, begins that the ESOP  
19 shall terminate no later than June 30, 1998. That  
20 section calls for, on page 3, Suburban applying to the  
21 IRS for approval of a transaction. In the event that  
22 the distribution and termination of the plan would have  
23 violated Section 415, that means and process was not  
24 applied for to the IRS.

25 The plan continued with the payroll of the

1 remaining Suburban employees continuing to shrink,  
2 while the assets continued to be the same or to grow,  
3 which continued to exacerbate the Section 415  
4 violation.

5 Q. Now, if I understand your answer, you're  
6 saying that Suburban was required by this provision of  
7 the affiliation agreement to apply for a determination  
8 letter from the IRS; is that correct?

9 A. Yes.

10 Q. Now, when was Suburban supposed to do this,  
11 what time frame, before or after the merger?

12 A. Prior to March 1 of 1998.

13 Q. Now, so sometime before March 1 of 1998, is  
14 that what you're saying?

15 A. They were -- that Housley Kantarian was to  
16 provide a request that the ESOP be tax qualified upon  
17 its termination, yes.

18 Q. And as of that date, March of 1998, on whose  
19 behalf was Housley Kantarian acting?

20 A. I don't recall.

21 Q. Who was the plan sponsor at that time?

22 A. I don't recall what the closing date was.

23 MR. FISCHER: I'm going to object. I want to  
24 get my objection on to the form of the question  
25 because it's two different things.

1 BY MR. MEYER:

2 Q. Let's break that down. Assume with me that  
3 the merger occurred on July 25, 1998. Does that sound  
4 to be the right time frame to you?

5 A. I think so.

6 Q. Assuming that, after July 25, 1998, and  
7 through March of -- excuse me, I think I might have  
8 said the wrong date. July 25, 1997 would be the merger  
9 date, closing date; does that sound right to you?

10 A. I really don't remember.

11 Q. Okay. Then let's just assume that that's the  
12 case.

13 A. Okay.

14 Q. So assuming that the merger agreement closed  
15 as of July 25, 1997, what was the legal status of  
16 Suburban Federal after that date?

17 A. It would have been merged into Fifth-Third  
18 Bancorp.

19 Q. Would Suburban Federal have any legal  
20 capacity after the closing date of the merger?

21 MR. FISCHER: Objection.

22 A. The corporation would not.

23 Q. And after the closing of the merger, what was  
24 the status of the Suburban ESOP?

25 A. It remained a qualified plan.

1 Q. Okay. Who was the sponsor of that qualified  
2 plan after the merger?

3 A. Fifth-Third Bancorp.

4 Q. And I think we established last time you  
5 don't know whether Fifth-Third was the trustee?

6 A. Right.

7 Q. Do you have any reason to believe it was not  
8 the trustee?

9 A. No.

10 Q. Now, if Suburban Federal went out of  
11 existence as of the date of the merger, and the  
12 Suburban ESOP continued to exist with Fifth-Third Bank  
13 as the sponsor and as the employer, and assume with me  
14 as the trustee, whose obligation was it to seek this  
15 determination letter from the IRS?

16 A. According to the documentation, it was  
17 counsel for Suburban at the time.

18 Q. Okay. And do you know why they didn't seek a  
19 determination letter by March of 1998?

20 A. By that time -- by that time, I think that it  
21 was because of the 415 violation, that they thought it  
22 would be fruitless.

23 Q. Did Fifth-Third agree with that, that it  
24 would be fruitless?

25 A. Yes.

1 Q. And what actions did Fifth-Third take, if  
2 any, to determine that it would be fruitless to seek  
3 the IRS determination?

4 A. I don't know.

5 Q. Did you personally do anything?

6 A. No.

7 Q. If anybody at Fifth-Third did, who would that  
8 have been?

9 A. Most likely, Jim Gurton in consultation with  
10 Mr. Goodson.

11 Q. Assume with me that Jim Gurton had not  
12 been -- was not an employee of Fifth-Third at that  
13 time. Who would it have been, other than Jim Gurton?

14 MR. FISCHER: Objection.

15 A. Boy, it would have been the head of the  
16 benefits group then and I don't recall at that time who  
17 it was.

18 Q. Now, after the date of the effective date of  
19 the merger, the closing date of the merger in July of  
20 1997, after that time, who was Housley Kantarian  
21 working for? If they did anything in relation to the  
22 this ESOP, who were they working on behalf of?

23 A. I don't know.

24 Q. To your knowledge, did the Suburban ESOP pay  
25 any fees to Housley Kantarian to do any work for the

1 ESOP?

2 A. I don't recall.

3 Q. If they did, would that show up on the Form  
4 5500?

5 A. Yes, I think so.

6 Q. Let me ask you about a provision of Exhibit  
7 32, at the bottom of page 2. The document states that,  
8 if, upon development of the written description and  
9 timetable referred to above -- and that would be  
10 Exhibit 22, would it not?

11 A. Uh-huh, yes.

12 Q. The parties agree in good faith that any --  
13 that allocation of all or any of the shares of stock  
14 held in the ESOP expense account would violate the code  
15 Section 415 limitations -- was there any such good  
16 faith agreement that any allocations of shares would  
17 violate Section 415?

18 A. Yes.

19 Q. And when was that good faith determination  
20 made?

21 A. I don't remember the exact date.

22 Q. Was it after the merger?

23 A. I don't remember.

24 Q. How did you come to a determination in good  
25 faith that an allocation of the shares would violate



1 Section 415?

2 A. I didn't personally come to that conclusion.

3 Q. Okay. That's the conclusion you thought that  
4 Jim Gurton and Steve Goodson and you talked about?

5 A. Yes.

6 Q. So that discussion between -- among the three  
7 of you would have occurred after the effective date of  
8 the merger; isn't that correct?

9 A. I had discussions with those two after the  
10 merger, yes.

11 Q. About possible violation of Section 415 and  
12 allocations?

13 A. I was told at that point that there was a 415  
14 violation or there would be, we didn't discuss when  
15 anyone was made aware of it.

16 Q. Do you have any reason to believe that Steve  
17 Goodson came to a conclusion before the closing date of  
18 the merger that the Section 415 limitations would not  
19 be met by June 30th, 1998?

20 A. I don't have any reason to believe either  
21 way.

22 Q. Now, do you know at what circumstances a plan  
23 may ask for a determination letter from the IRS where  
24 Section 415 limitations are not being met and they can  
25 get that determination letter that the plan qualifies

1 despite the 415 violations?

2 A. No.

3 MR. FISCHER: Can I hear that question again?

4 (The record was read.)

5 MR. FISCHER: Objection. The answer was no?

6 THE WITNESS: No.

7 BY MR. MEYER:

8 Q. Do you know whether there are any  
9 circumstances in which the IRS will give -- will allow  
10 a plan to qualify despite 415 limitations?

11 A. No.

12 Q. Exhibit 32, on page 3, if you will look at  
13 that with me.

14 A. Yes.

15 Q. The sentence reads, if and only if the IRS  
16 approves such a transaction. Do you see that?

17 A. Yes.

18 Q. What kind of a transaction is this document  
19 speaking about, if you know?

20 A. A transaction where the shares remaining,  
21 after fully utilizing the Section 415 limits, would  
22 revert to Fifth-Third or are transferred to an employee  
23 benefit plan of Fifth-Third.

24 Q. So the first part of that sentence  
25 contemplates if and only if the IRS approves such a

1 transaction; is that correct?

2 A. Yes.

3 Q. Did the IRS approve such a transaction?

4 A. Not to my knowledge.

5 Q. Did anyone apply for approval of such a  
6 transaction --

7 A. Not --

8 Q. -- with the IRS?

9 A. Not to my knowledge.

10 Q. Do you know why no one did?

11 A. Because there was never such a transaction  
12 entered into.

13 Q. Now, by this agreement, in your opinion,  
14 could Fifth-Third proceed with such a transaction  
15 without IRS approval?

16 A. Yes.

17 Q. And why was that provision put into this  
18 agreement?

19 A. Because Fifth-Third would have been the one  
20 to assume the risk.

21 Q. The risk of what?

22 A. Of entering into a transaction without  
23 approval.

24 Q. Why did Fifth-Third want to have that ability  
25 by this agreement to enter into a transaction without

1 IRS approval?

2 A. I don't know the specific reason for that,  
3 other than, as I said, Fifth-Third would be the one  
4 responsible for making the -- would be responsible for  
5 making the decision about whether to transfer assets  
6 out of the plan.

7 Q. Was this provision of the affiliation  
8 agreement, namely Exhibit 32, was that -- was the terms  
9 of this document negotiated by you?

10 A. No.

11 Q. Who negotiated the terms of this document?

12 A. Mr. Goodson.

13 Q. So Mr. Goodson was acting on behalf of  
14 Fifth-Third in those negotiations; is that correct?

15 A. Yes.

16 Q. And who was acting on behalf of Suburban or  
17 on behalf of the Suburban plan?

18 A. The Housley Kantarian law firm.

19 Q. Were they acting on behalf of the plan or on  
20 behalf of Suburban, or do you know?

21 A. I don't know.

22 Q. Do you know which -- do you know if  
23 Mr. Goodson sponsored this particular language about  
24 Fifth-Third otherwise proceeding with a transaction  
25 without IRS approval?

1 MR. FISCHER: Objection to the term  
2 sponsored.

3 A. I don't recall.

4 Q. Do you know if he initiated that language?

5 A. I don't recall.

6 Q. Is that a concept that you and Mr. Goodson  
7 discussed?

8 MR. FISCHER: Objection. Don't answer that  
9 question. That would have been prior to the  
10 merger.

11 MR. MEYER: He can't discuss what -- he can't  
12 tell me what he discussed in terms of negotiating  
13 the language?

14 MR. FISCHER: You asked what he discussed.  
15 You asked him what he discussed with Mr. Goodson  
16 about language put into a document that they were  
17 negotiating with a third-party. No, he's not  
18 going to answer that question.

19 MR. MEYER: Just so we're -- I'm clear about  
20 what the objection is --

21 MR. FISCHER: The objection is privilege.

22 MR. MEYER: No, I'm saying what the objection  
23 applies to. In order to make sure, I'm going to  
24 ask a specific question.

25 BY MR. MEYER:

1 Q. Did you and Mr. Goodson have any discussions,  
2 that you can recall, about the particular language of  
3 Exhibit 32 which gives Fifth-Third the flexibility to  
4 proceed with a transaction without IRS approval?

5 MR. FISCHER: Don't answer that question. If  
6 you would have stopped before the approval, I  
7 would have allowed it. But don't answer that  
8 question. That goes into what was discussed.

9 Q. Did you yourself have any input into this  
10 language about Fifth-Third otherwise proceeding with a  
11 transaction without IRS approval?

12 A. I don't recall.

13 Q. And you said that -- if I understood your  
14 answer, you said that Fifth-Third was willing to assume  
15 a risk?

16 MR. FISCHER: Objection, that wasn't his  
17 testimony.

18 A. No, that's not what I said.

19 Q. So Fifth-Third was not assuming any risk in  
20 proceeding with this provision of the affiliation  
21 agreement?

22 A. I don't understand that question.

23 Q. In your opinion, was Fifth-Third assuming any  
24 risk of violations of Section 415 when it became the  
25 sponsor of this plan?

1           A.     We would have assumed whatever inherent risks  
2     there was in the plan.

3           Q.     Exhibit 32 goes on to state that Fifth-Third  
4     will pay out of its corporate assets and not plan  
5     assets any equivalent amount; do you see that  
6     language?

7           A.     Yes.

8           Q.     Where did that concept come from, the  
9     Suburban side or the Fifth-Third side?

10          A.     I don't recall.

11          Q.     Do you know why that provision was put in  
12     there?

13          A.     No.

14          Q.     Can we assume that you reviewed that  
15     provision with Mr. Goodson?

16                 MR. FISCHER: This paragraph?

17                 MR. MEYER: That particular language he just  
18     referred to.

19                 MR. FISCHER: Objection. Don't answer that  
20     question. Privilege.

21     BY MR. MEYER:

22          Q.     Did you review the terms of Exhibit 32 with  
23     Mr. Goodson?

24          A.     I assume I did, but I don't specifically  
25     remember discussing them.

1 Q. Are there any provisions in Exhibit 32 that  
2 you do have a specific recollection of reviewing with  
3 Mr. Goodson?

4 A. Yes.

5 Q. And what is that language?

6 MR. FISCHER: Don't answer that question.  
7 Privilege.

8 MR. MEYER: You're not allowing him to say  
9 what provisions he recalls discussing?

10 MR. FISCHER: Then you're getting into the  
11 subject of the discussions.

12 MR. MEYER: I'm getting into what language in  
13 here that he remembers discussing. I'm not asking  
14 for what Mr. Goodson said about it.

15 MR. FISCHER: You're also asking what he  
16 reviewed. I'm permitting you to ask him the  
17 subject matter of the issue. He's answered that  
18 question. The issue is the paragraph, you asked  
19 him did he discuss it with Mr. Goodson. You asked  
20 him did he review any specific provisions.

21 MR. MEYER: Right. Attorney-client privilege  
22 is very narrow and I disagree it applies at all to  
23 this discussion in the merger negotiation.

24 MR. FISCHER: Prior to the merger. Prior to  
25 merger, it's absolutely clear, they're adverse



1 parties.

2 MR. MEYER: It's not clear whatsoever because  
3 it results in language which is in dispute in this  
4 case. But aside from that, we can argue that some  
5 other time.

6 BY MR. MEYER:

7 Q. My specific question to you is, are there any  
8 provisions in Section 32 that you specifically recall  
9 discussing with Mr. Goodson?

10 A. Yes.

11 Q. Now, just so it's clear for the record, what  
12 are those provisions?

13 MR. FISCHER: You can answer by description,  
14 but not divulge anything discussed between you and  
15 Mr. Goodson.

16 A. The provisions relating to contributions to  
17 be made by Suburban for the plan year ending June 30,  
18 1997, the provisions relating to securing a  
19 determination letter and that responsibility contained  
20 on page 3 of Exhibit 32. That's all I specifically  
21 recall.

22 Q. With regard to the first subject matter of  
23 contributions, on what page are you referring to?

24 A. Page 2 of Exhibit 32, paragraph B.

25 Q. What were your concerns about contributions

1 by Suburban between the time of the merger agreement  
2 and the closing?

3 MR. FISCHER: Wait for a second. He's going  
4 into -- you're asking for the mental processes,  
5 impressions of a counsel for the Bancorp.

6 MR. MEYER: Right. They apparently resulted  
7 in either agreeing or disagreeing with the  
8 language here.

9 MR. FISCHER: Can I have a moment to talk  
10 with my client to determine privilege?

11 MR. MEYER: Go ahead.

12 (Off the record.)

13 MR. FISCHER: Back on. We're willing to try  
14 to resolve this through a different method. We'll  
15 let him answer the question you asked based upon  
16 his concerns as the business representative for  
17 the bank. General counsel, under GAF and other  
18 cases, have two duties, one as counsel and one as  
19 a business person.

20 Communications with Mr. Goodson will not be  
21 disclosed prior to the merger. But his business  
22 concerns, Mr. Reynolds' business concerns, we will  
23 permit to go ahead. It's just hard sometimes for  
24 him to distinguish and that's what we're trying to  
25 do here.

1 MR. MEYER: Right. That's a distinction I  
2 was trying to make by saying you, you being the  
3 representative of Fifth-Third in these merger  
4 negotiations.

5 MR. FISCHER: And we're trying to do that to  
6 resolve this.

7 MR. MEYER: All right.

8 MR. FISCHER: If you could reread the  
9 question.

10 MR. MEYER: Well, I'm talking about the first  
11 area of your concern or I should say Fifth-Third's  
12 concern.

13 MR. FISCHER: Well, sorry, let's go back for  
14 a second because he did have business concerns.  
15 You asked questions about counsel, he was  
16 reluctant to answer some stuff about the Housley  
17 Kantarian situation. He was answering it, holding  
18 back. You can talk about counsel to correct  
19 something earlier.

20 THE WITNESS: Oh, about --

21 MR. FISCHER: Yeah.

22 THE WITNESS: About -- well, no, that was  
23 part of --

24 MR. FISCHER: Part of that?

25 THE WITNESS: That's part of this.

1 MR. FISCHER: Okay, that's fine then. Go  
2 ahead.

3 BY MR. MEYER:

4 Q. Your first area of concern in Exhibit 32 that  
5 you recollect having discussion with Mr. Goodson  
6 involved the subject matter of contributions by  
7 Suburban; is that right?

8 A. That's correct.

9 Q. And that's reflected -- the language  
10 regarding the contributions appears on page 2 of  
11 Exhibit 32?

12 A. That's correct.

13 Q. That's subparagraphs A and B; is that  
14 right?

15 A. Yes.

16 Q. Are Fifth-Third's concerns, whatever they  
17 were with regard to contributions, are they -- were  
18 those concerns satisfied by the language chosen in  
19 paragraphs A and B on page 2 of Exhibit 32?

20 A. Can you ask me that again?

21 Q. Let me ask you specifically, to try to get at  
22 it another way. Subparagraph A on page 2 of Exhibit 32  
23 states that Suburban Bancorp may make contributions to  
24 the ESOP for the plan year ending June 30, 1997 in the  
25 amount accrued in the ordinary course through February

1 28, 1997. Do you see that?

2 A. Yes.

3 Q. And did Fifth-Third agree to that?

4 A. Yes.

5 Q. Did that provision satisfy whatever concerns  
6 Fifth-Third had about contributions through that  
7 date?

8 A. Yes.

9 Q. What was Fifth-Third's concern?

10 A. A, by itself, was not a concern.

11 Q. Okay. And subparagraph A on page 2 of  
12 Exhibit 32 relates to the timetable, does it not?  
13 Specifically paragraph 1-A of the timetable making  
14 reference to contributions of \$133,635?

15 MR. FISCHER: Objection.

16 A. It appears to, yes.

17 Q. So if I can state it in simple language, I  
18 take it by Fifth-Third's agreeing to subparagraph A on  
19 page 2 of Exhibit 32 that Suburban Bancorp may make  
20 contributions in the -- accrued in the ordinary course,  
21 Fifth-Third did not have a problem with Suburban  
22 Bancorp contributing \$133,635 to the ESOP; is that  
23 correct?

24 A. The agreement said that they could make that  
25 contribution, yes.

1 Q. I mean, did you have any lingering concerns  
2 about that contribution or no concerns on behalf of  
3 Fifth-Third?

4 A. We had concerns.

5 Q. What was the concern?

6 A. The concern was, when coupled with the  
7 additional contributions they wanted to make in B, that  
8 there would at some point be a 415 violation.

9 Q. Okay. So let's take B. Subparagraph B on  
10 page 2 of Exhibit 32 ultimately permitted a  
11 contribution of \$42,000, did it not?

12 A. Yes.

13 Q. Did that contribution, along with \$133,000  
14 contribution, did that create a 415 violation?

15 A. Contributed to it, yes.

16 Q. And in what way did it contribute to it?

17 A. By increasing the plan assets to a point  
18 that, when the plan was to be terminated, that they  
19 exceeded the eligible payroll.

20 Q. And when did that become known to you or  
21 Fifth-Third?

22 A. I don't remember the exact date that I  
23 learned of it.

24 Q. Okay. Was that before or after the closing  
25 date of the merger?

1 A. I learned after the closing date.

2 Q. Anybody, to your knowledge, learn before the  
3 closing date?

4 A. I don't know.

5 Q. And how did this come to anyone's attention,  
6 that the combination of contributions of \$133,000 and  
7 42,000 created a Section 415 problem?

8 A. It was discussed when Suburban asked if they  
9 could make that contribution.

10 Q. When did they ask if they could make that  
11 contribution, before or after the closing date?

12 A. Before.

13 Q. And who did they ask? Did they ask you?

14 A. They inserted it into the document as a  
15 request.

16 Q. Which document?

17 A. The affiliation agreement.

18 Q. And what was your -- what was Fifth-Third's  
19 response?

20 A. We allowed them to put it in there. There  
21 was a concern on everyone's part that there would be a  
22 415 violation and, therefore, the language was  
23 negotiated into the agreement about what would happen  
24 in the event that the plan assets -- that the plan  
25 couldn't be terminated because of a violation.

1 Q. At any time prior to the merger did you reach  
2 a conclusion that this would create a -- these  
3 contributions would create a Section 415 violation?

4 A. I did not, no.

5 Q. What did you do to satisfy yourself one way  
6 or the other that these contributions would or would  
7 not pose a Section 415 problem?

8 A. Can you ask me that again, please?

9 Q. Yeah. What did you do, anyone on behalf of  
10 Fifth-Third do, to assure Fifth-Third that this would  
11 not -- these contributions would not pose a Section 415  
12 violation?

13 A. We built the contingencies into the document.

14 Q. What contingencies did you build in?

15 A. The timetable and the provisions in the  
16 agreement.

17 Q. What provisions would alleviate this concern  
18 of Fifth-Third?

19 A. We would always have the concern. But we  
20 built in here is what would be done if the 415  
21 violation occurred.

22 Q. And what did you build in on behalf of  
23 Fifth-Third?

24 A. Nothing particularly on our behalf. There  
25 was an agreement reached with Suburban about what would



1 happen if the violation occurred.

2 Q. And what would happen as per the agreement?

3 A. I can walk through and read the whole thing  
4 again. We've kind of been through -- you've asked me  
5 all the sections. But the timetable describes  
6 particularly what would happen with the plan prior to  
7 and after closing. And the provisions in Exhibit 32  
8 talk about the contingencies in the event that the ESOP  
9 did not terminate on June 30th, 1998 and beyond. And  
10 if there was a 415 violation, what steps would be  
11 taken.

12 Q. Was there any provision in this agreement  
13 that Fifth-Third could open up the Suburban ESOP to  
14 Fifth-Third employees in the event that Section 415  
15 limitations could not be met?

16 A. Does it affirmatively state that?

17 Q. Yes.

18 A. No.

19 Q. Did you consider that as an option at the  
20 time that you negotiated this agreement?

21 A. I don't recall.

22 Q. Do you recall any discussions with anybody on  
23 behalf of Suburban Bancorp that Fifth-Third could open  
24 up this plan to Fifth-Third employees?

25 A. I didn't discuss that with anyone.

1 Q. Do you know if Mr. Goodson discussed that as  
2 part of the negotiations?

3 A. I don't know.

4 Q. Would Mr. Goodson need your approval to  
5 discuss that with the Suburban people?

6 A. He would need my approval to discuss anything  
7 with anyone.

8 Q. Would he need your approval to put it into an  
9 agreement?

10 A. Yes.

11 Q. Just so it's clear, he would need your  
12 approval to put it into an agreement?

13 A. Yes.

14 Q. And you did not put it into this agreement,  
15 did you, Exhibit 32, that Fifth-Third could open up the  
16 plan to allow Fifth-Third employees into the plan?

17 MR. FISCHER: Objection.

18 A. The agreement does not state that, no.

19 Q. Now, as I understand it, your second area of  
20 concern with regard to the provisions of Exhibit 32,  
21 the subject matter was the determination letter; is  
22 that correct?

23 A. It was an area of concern. You asked me what  
24 I remembered discussing prior to the.

25 Q. I think that's the question which

1 precipitated your telling me that there were two areas  
2 of concern that you recollect discussing.

3 A. Yes.

4 Q. And one of them was the contributions?

5 A. Uh-huh.

6 Q. And the second one was the determination  
7 letter; is that correct?

8 A. That wasn't the determination letter itself.

9 Q. What was it that you recall discussing --

10 A. The --

11 Q. -- as a representative of Fifth-Third?

12 MR. FISCHER: No. The word discussing. You  
13 asked his concerns. I'm not going to let him  
14 answer the question about discussions with  
15 Mr. Goodson prior to.

16 BY MR. MEYER:

17 Q. What is it about the determination letter  
18 that was a concern on behalf of Fifth-Third?

19 A. That the agreement that counsel selected by  
20 Suburban Bancorp would be responsible before and after  
21 the effective time for securing the determination.

22 Q. After the effective time, meaning after the  
23 closing date?

24 A. Yes.

25 Q. And Fifth-Third's concern was that there was

1 an agreement that Housley Kantarian do something  
2 that -- would they would be acting on behalf of  
3 Fifth-Third after the merger?

4 MR. FISCHER: Objection.

5 Q. I'm trying to make the concern specific.  
6 Tell me if I'm wrong.

7 A. That Housley Kantarian was the firm selected  
8 by Suburban Bancorp and was doing work for them. And  
9 following the merger, it would be our plan, our  
10 responsibility. But Housley Kantarian was to continue  
11 to be directed by individuals from Suburban.

12 Q. As it turned out, do you think anyone on  
13 behalf of the Suburban participants in the ESOP  
14 directed Housley Kantarian not to seek this  
15 determination letter?

16 A. I don't know.

17 Q. I believe you testified earlier that you  
18 thought it would be fruitless to request such a  
19 determination letter from the IRS; is that what you  
20 said?

21 A. That's what I was told.

22 Q. Told by whom?

23 A. I believe Mr. Goodson.

24 Q. Did he tell you why?

25 MR. FISCHER: This is after the merger.

1 Okay.

2 A. Because of the current value of the assets in  
3 the plan as compared to the continuing payroll of the  
4 former Suburban employees.

5 Q. And what's the time frame of this  
6 discussion?

7 A. I don't remember exactly, other than it was  
8 after the merger.

9 Q. Well, last week we discussed that the value  
10 of the plan assets went from about 1.9 million to 3.1  
11 million; do you recall that discussion?

12 A. I recall you showing me on a 5500, yes.

13 Q. How did that increase in value relate to  
14 requesting a determination letter?

15 A. As I said, I'm not sure how the accounting of  
16 the determination works.

17 Q. Do you know why the value went from 1.9 to  
18 3.1 million?

19 A. I don't.

20 Q. Now, after the effective date of the merger,  
21 could Fifth-Third direct Housley Kantarian to request a  
22 determination letter?

23 MR. FISCHER: Could whom? I'm sorry.

24 MR. MEYER: Fifth-Third.

25 A. I assume we could have directed them, yes.

1 Q. As the sponsor of the Suburban ESOP after the  
2 merger, could Fifth-Third have requested this  
3 determination letter?

4 A. Not -- only if Housley Kantarian would have  
5 prepared it.

6 Q. Why is that?

7 A. Because the agreement provides that they  
8 would request it.

9 Q. Is it your testimony that Fifth-Third was not  
10 willing to deviate from the language of this  
11 affiliation agreement in requesting a determination  
12 letter itself and, yet, you were willing to let  
13 Fifth-Third employees in this plan?

14 MR. FISCHER: Objection to form.

15 A. The representatives of Suburban had indicated  
16 they wanted continued control of requesting the  
17 determination letter.

18 Q. Who on behalf of the Suburban people told you  
19 that?

20 A. When we were negotiating the agreement, it  
21 was clear to them that they wanted -- Housley Kantarian  
22 indicated to us that the principals of Suburban  
23 insisted that they be the firm that file all the  
24 determination letters and requests following the merger  
25 or dealing with the termination of the plan.

1 Q. So did somebody from Housley tell you that?

2 A. I don't recall who it was, but I do recall  
3 that being part of the negotiations, yes.

4 Q. Would Fifth-Third have asked for the  
5 determination letter if Housley Kantarian declined to  
6 do so?

7 A. I don't know.

8 Q. You don't know why it would have been  
9 fruitless to send such a request to the IRS?

10 A. I think I answered that already.

11 Q. You don't know why?

12 MR. FISCHER: Objection. Go ahead.

13 A. I was acting pursuant to advice of counsel,  
14 who indicated that the assets in the plan exceeded the  
15 continuing payroll for former Suburban employees.

16 Q. Okay. But, in fact, what this Exhibit 32  
17 states is that, in the event the 415 limits couldn't be  
18 met, then Suburban, through Housley Kantarian, would  
19 ask for a determination letter; isn't that correct?

20 A. Yes, that was one thing that could have been  
21 done, yes.

22 Q. So that's why I asked the question. You're  
23 telling me that the value of the shares in the expense  
24 account exceeded 415 limitations and, therefore, it  
25 would be fruitless to ask for a determination letter.

1 And yet, that's the exact circumstance in which this  
2 agreement calls for that determination letter request  
3 to be made, isn't it?

4 MR. FISCHER: Objection.

5 A. Was that a question?

6 MR. FISCHER: It's a comment.

7 Q. No, I'm asking.

8 MR. FISCHER: It's an argument.

9 A. Ask me a question.

10 Q. It may be. I don't mean to argue with you.

11 A. I understand.

12 Q. I'm wondering, from the Fifth-Third business  
13 perspective, what was the intention of having this  
14 sentence in this agreement, that Suburban would ask for  
15 a determination letter in the event that 415 limits  
16 couldn't be met?

17 A. Allowing them to terminate the plan and  
18 distribute the assets to -- that the plan could be  
19 terminated. It was everyone's intention that the plan  
20 be terminated as soon as possible and not be a  
21 continuing plan.

22 Q. From the Fifth-Third perspective, was  
23 Fifth-Third aware of circumstances in which a plan  
24 could be terminated with IRS approval even though 415  
25 limitations could not be met?



1 MR. FISCHER: Objection. We've asked that.

2 We've gone through that.

3 A. I don't know. The agreement provides either  
4 for the request that they do it, ask for a  
5 determination letter in that manner or that the shares  
6 otherwise revert to or are transferred to another  
7 employee benefit plan.

8 Q. Did Fifth-Third ever demand of Housley  
9 Kantarian that it request this determination letter so  
10 that the plan could be terminated even though there  
11 were -- there was value in the plan that could not be  
12 allocated within Section 415 limits?

13 A. I don't think so.

14 Q. Do you know of any activities that Housley  
15 Kantarian undertook on behalf of the Suburban ESOP or  
16 related to the Suburban ESOP after the closing of the  
17 merger agreement?

18 A. I don't know.

19 Q. Would any of their activities have to be  
20 approved by you?

21 A. On behalf of the ESOP?

22 Q. Yes.

23 A. I would be made aware of them, not  
24 necessarily have to approve them.

25 Q. Have you seen any documents in your review of

1 documents that Housley Kantarian did anything on behalf  
2 of the Suburban ESOP after the closing of the merger  
3 agreement?

4 A. No documents that I know of. I was contacted  
5 at one point about the -- about the ultimate  
6 disposition of the ESOP, yes.

7 Q. And can you give me a time frame on that?

8 A. It was somewhere close to the filing of the  
9 litigation. They were calling me on behalf of the  
10 former Suburban principals.

11 Q. What did they tell you?

12 A. That the principals of Suburban had some  
13 concerns about the operation of the plan. And  
14 that's -- I can't remember specifics. That was the  
15 crux of the conversation.

16 Q. What did you tell them?

17 A. I told them that I had discussed it with  
18 Steve Goodson and Jim Gurton and I believe I directed  
19 them to talk to Steve.

20 Q. Do you recall who from Housley Kantarian you  
21 spoke with?

22 A. I don't.

23 Q. So from the time of the closing of the merger  
24 agreement until this phone conversation with Housley  
25 Kantarian shortly before the litigation was filed, you

1 don't recall any other contacts with Housley  
2 Kantarian's attorneys?

3 A. Not on this matter.

4 Q. Were you dealing with them on other  
5 matters?

6 A. I believe I've dealt with them on other  
7 acquisitions before, but I can't -- I've done so many  
8 of them, I can't remember. I talked to Lynn Bohlen on  
9 other transactions, but I can't remember if it was  
10 before or after.

11 Q. Let me show you Exhibit 33.

12 (Plaintiff's Exhibit Number 33 was marked for  
13 identification.)

14 Q. For the record, Exhibit 33 is a part of a  
15 letter from Housley Kantarian to Steve Goodson with  
16 the -- a version of the 1997 amendment to the Suburban  
17 ESOP attached, Bates numbers SU1765, consecutively,  
18 through SU1771. And I'll ask you if you've reviewed  
19 this exhibit in preparation for your deposition?

20 A. I saw it in a stack of documents. I didn't  
21 review it in detail, no.

22 Q. This particular document does not have a  
23 signature page on the letter. The document you saw,  
24 did it have a signature page?

25 A. I don't recall.

1 Q. Exhibit 33 appears to be a letter dated June  
2 24, 1997 from Housley Kantarian to Steve Goodson, of  
3 more than one page. We only have one page. I'll ask  
4 you to look at numbered paragraph 1.

5 MR. FISCHER: Objection. The best I can  
6 tell, Rick, this is part of a fax that's 14 pages  
7 long. This is the second -- the first page of the  
8 exhibit is the second page. Goes through page 8  
9 of 14. It looks like the last 6 pages are  
10 missing. I'm just --

11 MR. MEYER: Last 6 pages of the --

12 MR. FISCHER: I'm just looking at the fax at  
13 the top, says page 2 of 14 then 3 of 14. It goes  
14 through 8 of 14 and then it stops.

15 BY MR. MEYER:

16 Q. The paragraph I'm interested in is on page 1  
17 so it satisfies my questions. I just want the record  
18 to be clear. That paragraph number 1 relates to the  
19 1997 amendment, does it not?

20 A. That's what it says.

21 Q. Do you recall the 1997 amendment to the  
22 Suburban ESOP?

23 A. No.

24 Q. Have you reviewed this 1997 amendment in  
25 preparation for your deposition?

1           A.    I saw it in the stack of documents.  I didn't  
2   review it in detail.

3           Q.    Page 1 of Exhibit 33 states that paragraph 9  
4   addresses your comments.  From the context here, that  
5   appears to be Steve Goodson's comments, does it not?

6           A.    Yes, it does.

7           Q.    Paragraph 9 addresses your comments regarding  
8   participation by Suburban employees after the merger  
9   closing and participation of Suburban employees who  
10   terminate prior to their closing to take employment  
11   with Fifth-Third.  Do you see that?

12          A.    Yes.

13          Q.    Part of paragraph 9 of the amendment limits  
14   participation of the plan to individuals who're  
15   participants immediately prior to the effective time of  
16   the company's merger into Fifth-Third Bancorp; is that  
17   correct?

18          A.    Can you ask me that again now?  I just read  
19   it.

20          Q.    Does paragraph 9 of the 1997 amendment limit  
21   participation in the plan to individuals who're  
22   participants immediately prior to the effective time of  
23   Suburban's merger into Fifth-Third?

24               MR. FISCHER:  Objection.

25          A.    That's one of the things it does, yes.

1 Q. And is that limitation consistent with the  
2 affiliation agreement that we just went through,  
3 Exhibit 32?

4 MR. FISCHER: Objection.

5 A. I have to look at that again.

6 Q. The specific provision I'm asking you if  
7 there's a consistency with appears on the bottom of  
8 page 1 of Exhibit 32 and continues on to the top of  
9 page 2.

10 In particular, it states, in connection with  
11 the development of a written description and timetable  
12 referred to above and resolution of the ESOP, the  
13 parties agree that they intend that, to the extent not  
14 prohibited by law, the ESOP shall be maintained through  
15 the date of its final termination for the exclusive  
16 benefit of individuals who have become ESOP  
17 participants on or before the effective time.

18 What I'm asking you is, is the 1997  
19 amendment, paragraph 9, subparagraph 2, consistent with  
20 that provision I just read from the affiliation  
21 agreement?

22 A. Yes.

23 Q. Did you yourself review the 1997 ESOP  
24 amendment?

25 A. I don't recall.

1 Q. If you didn't, was Steve Goodson authorized  
2 to do it on behalf of Fifth-Third?

3 A. Yes.

4 Q. And why was Fifth-Third reviewing an  
5 amendment to the ESOP that was put into place before  
6 the merger was finalized?

7 A. Before the effective date?

8 Q. Yes, sir.

9 A. I seem to recall that there was a provision  
10 in the affiliation agreement that would require that  
11 amendments to the plan be approved by Fifth-Third  
12 before they were made.

13 Q. So then the 1997 amendment was approved by  
14 Fifth-Third?

15 A. Yes.

16 (A recess was taken from 11:32 to 11:36.)

17 (Plaintiff's Exhibits Numbers 24 and 25 were  
18 marked for identification.)

19 BY MR. MEYER:

20 Q. Let me ask you to look at Exhibit 24. Have  
21 you had a chance to review Exhibit 24?

22 A. Yes.

23 Q. This is a 1999 amendment to the Suburban  
24 ESOP, is it not?

25 A. Yes.

1 Q. Signed by you?

2 A. Yes.

3 Q. Why would you sign this amendment?

4 A. Because I was the director of legal/human  
5 resources at the time.

6 Q. And you signed it on May 10, 1999; is that  
7 correct?

8 A. Yes.

9 Q. Did you draft this 1999 amendment?

10 A. No.

11 Q. Who did?

12 A. I don't recall.

13 Q. Who would have, in the ordinary course?

14 A. Mr. Gurton, with advice of counsel,  
15 ordinarily Steve Goodson.

16 Q. If you look at page 1 of Exhibit 24, it  
17 states that, as of May 10, 1999, the Fifth-Third Bank,  
18 as successor to Suburban Federal Savings Bank -- do you  
19 see that?

20 A. Yes.

21 Q. It says that Fifth-Third maintains the  
22 Suburban Bancorporation, Inc. employee stock ownership  
23 plan for employees who were previously employed by  
24 Suburban Federal Savings Bank. Do you see that?

25 A. Yes.



1 Q. And that was true as of May 19, 1999, was it  
2 not?

3 A. To my knowledge, yes.

4 Q. I take it you read this document before you  
5 signed it, did you not?

6 A. Yes.

7 Q. I'll ask you to look at Exhibit 25. Exhibit  
8 25 is another 1999 amendment, is it not?

9 A. Yes.

10 Q. Now, this one doesn't seem to have a date on  
11 it. Do you know why that is?

12 A. No. It does have an effective date as of  
13 July 1st, 1998.

14 Q. Does that take the place of having a date? I  
15 mean, is that -- what's intended by leaving off the  
16 date of signing is to make it effective on some other  
17 date?

18 A. I don't know what the intent was. But it  
19 states it's adopted as of the date first written above,  
20 which would have been July 1st, 1998.

21 Q. Again, you're signing this as -- you sign  
22 it -- excuse me. You signed it as the director of  
23 legal/human resources at that time, correct?

24 A. Yes.

25 Q. Do you know the purpose of this amendment?

1           A.    It appears to provide for the distribution of  
2   a participant's account balance in either cash or  
3   stock.

4           Q.    Would there be some reason it's being made  
5   effective back to July 1, 1998 just from the contents?  
6   Can you conclude why it's being made effective July 1,  
7   1998?

8           A.    No.

9           Q.    I'm going to ask you to look at Exhibit 26.  
10                (Plaintiff's Exhibit Number 26 was marked for  
11                identification.)  
12                (Off the record.)

13          Q.    Do you recall the 2001 amendment which is  
14   Exhibit 26?

15          A.    I have reviewed it, but I don't recall what  
16   it was for, no.

17          Q.    Once again, you did sign it?

18          A.    Yes.

19          Q.    And what's the purpose of this amendment, if  
20   you can tell from the contents?

21          A.    One is setting the date for valuation of  
22   assets. The other is to allow -- or to provide for the  
23   distribution of assets in the event of actually  
24   changing Section 10.2 as was changed before.

25                And the final one is to provide for

1 distributions to participants under the plan. If it  
2 doesn't exceed 5,000, that they could elect to receive  
3 the shares. But if it was more than 5,000, they could  
4 not get it unless they got to a normal retirement age.

5 Q. Do you know why Section 10.6 was amended?

6 A. No.

7 Q. Is that a Fifth-Third idea or was that to  
8 stay qualified?

9 A. I have no idea.

10 Q. Now, the 2001 amendment does state that this  
11 plan is to be maintained for employees who were  
12 previously employed by Suburban Federal Savings Bank,  
13 does it not?

14 A. No, it doesn't.

15 Q. It acknowledges that Fifth-Third, as  
16 successor to Suburban Federal, is maintaining the plan  
17 for employees who were previously employed by Suburban  
18 Federal, does it not?

19 A. Yes.

20 (Plaintiff's Exhibit Number 27 was marked for  
21 identification.)

22 Q. Let me ask you to look at Exhibit 27.

23 A. Okay.

24 Q. Exhibit 27 is a letter from Steve Goodson to  
25 Housley Kantarian, dated May 8, 1997?

1 A. Yes.

2 Q. And you were copied on that letter; is that  
3 correct?

4 A. Yes.

5 Q. And the subject matter of this letter is the  
6 Suburban 401(k) plan, is it not?

7 A. Yes.

8 Q. Were there provisions in the affiliation  
9 agreement between Suburban Federal and Fifth-Third that  
10 related to the 401(k) plan, as well as the ESOP?

11 MR. FISCHER: Objection.

12 A. There typically are. I don't recall the  
13 specific provisions about the 401(k) plan that were in  
14 the Suburban affiliation agreement.

15 Q. Can we conclude from this letter that Section  
16 V.E.4. of the affiliation agreement related to the  
17 Suburban 401(k) plan?

18 MR. FISCHER: Objection.

19 A. I suppose we could.

20 Q. In particular, I'm referring to the sentence  
21 that states, you -- meaning Dan Hogans of Housley  
22 Kantarian -- you point out that Section V.E.4. of the  
23 affiliation agreement requires Fifth-Third's consent  
24 prior to making any distributions. Do you see that?

25 A. Yes.

1 Q. Would that be distributions from Suburban's  
2 401(k) plan --

3 A. I suppose.

4 Q. -- in the context of this letter?

5 A. In the context of this letter, that's what it  
6 appears to say, yes.

7 Q. Do you know why Mr. Goodson is saying that  
8 distributions from a 401(k) plan would be subject to  
9 provisions in the affiliation agreement?

10 A. I don't remember why in this particular case.  
11 But there can always be a number of reasons why you  
12 don't do that.

13 Q. Is that a typical provision in your  
14 affiliation agreements, that Fifth-Third retains the  
15 authority to make distributions from an acquired  
16 institution's 401(k) plan?

17 A. Depends on the plan itself. But yes,  
18 depending on the current status of the plan.

19 Q. So it is common then for Fifth-Third to put  
20 into its affiliation agreement some measure of control  
21 over the acquired institution's benefit plans?

22 A. Only if there's a concern about distributions  
23 from the plan at the time, yes.

24 Q. This letter of May 8th goes on to talk about  
25 a VCR application in the next paragraph; do you see

1 that?

2 A. Yes.

3 Q. What's a VCR application?

4 A. I've heard the term, but I don't know.

5 Q. Do you know if a VCR application was actually  
6 made in the instance of the federal -- excuse me, the  
7 Suburban Federal 401(k) plan?

8 A. I assume it was because it says pending  
9 applications.

10 MR. MEYER: Give us a couple minutes, we  
11 might be at the end.

12 MR. FISCHER: Sure.

13 (A recess was taken from 11:55 to 11:57.)

14 MR. MEYER: We can't come up with any more  
15 questions.

16 MR. FISCHER: Good.

17  
18  
19 \_\_\_\_\_  
PAUL REYNOLDS

20  
21  
22  
23 - - -  
DEPOSITION CONCLUDED AT 11:58 A.M.

## C E R T I F I C A T E

STATE OF OHIO :  
 : SS  
 COUNTY OF HAMILTON :

I, Linda Mallory, RMR, CRR, the undersigned, a duly qualified and commissioned notary public within and for the State of Ohio, do certify that before the giving of his deposition, PAUL REYNOLDS was by me first duly sworn to depose the truth, the whole truth and nothing but the truth; that the foregoing is the deposition given at said time and place by PAUL REYNOLDS; that I am neither a relative of nor employee of any of the parties or their counsel, and have no interest whatever in the result of the action; that I am not, nor is the court reporting firm with which I am affiliated, under a contract as defined in Civil Rule 28(D).

IN WITNESS WHEREOF, I hereunto set my hand and official seal of office at Cincinnati, Ohio, this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

My commission expires: Linda Mallory, RMR, CRR  
 February 25, 2010 Notary Public - State of  
 Ohio





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